88-1931

Supreme Court, U.S.
FILED
MAY 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

AMENDED
No. 89-

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

PAUL CAMEN,
Petitioner,

VS.

SAFECO INSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD D. LESSNER
9000 Sunset Blvd., Ste. 1115
Los Angeles, California 90069
(213) 276-1051
Counsel of Record for Petitioner, Paul Camen

Associate

THOMAS EDWARD WALL
12063 Jefferson Blvd.
Culver City, California 90230
(213) 827-4452
Counsel for Petitioner, Paul Camen

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTION PRESENTED FOR REVIEW

1. Whether sanctions can be imposed against a party under Federal Rules of Appellate Procedure Rule 38 absence a showing of "bad faith" on the part of the party.

LIST OF PARTIES

Petitioner is PAUL CAMEN.

Respondent is SAFECO INSURANCE COMPANY OF AMERICA.

Petitioner and Respondent are the same parties as in the proceeding below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	i
RULE 38 F.R.AP.	2
STATEMENT OF THE CASE	2
A. Background	2
B. The Proceedings in the District Court	3
C. The Decision of the Ninth Circuit	4
I.	
THE NINTH CIRCUIT'S DECISIONS IS IN CONFLICT WITH OTHER COURTS OF APPEALS ON WHETHER A SHOWING OF BAD FAITH IS REQUIRED FOR THE IMPOSITION OF SANCTIONS UNDER RULE 38 FEDERAL RULES OF APPELLATE PROCEDURE	5
A. The Decision Below is in Conflict With Other Circuits Which Have Required a Showing of Bad Faith Before Sanctions will be Imposed Under Rule 38 Federal Rules of Appellate Procedure	5
II.	
BECAUSE OF THE SPLIT BETWEEN THE CIRCUITS THIS COURT SHOULD CLARIFY THE APPLICATION OF RULE 38 TO ELIMINATE THE INCONSISTENCY REGARDING THE REQUIREMENT OF BAD FAITH	7
A. A Requirement of Bad Faith Would Serve the Purpose Behind Rule 38 and Yet Still Allow Freedom of Access to the Courts	7
CONCLUSION	10

INDEX TO APPENDICES

		Page
APPENDIX A.	Opinion of the United States Court of Appeals for the Ninth Circuit	A-1
APPENDIX B.	District Court's Ruling	B-1

TABLE OF AUTHORITIES CITED

Federal Cases

	Page
Burlington Northern R. Co. vs. Woods, ____U.S.____ 107 S.Ct. 967 (1987)	7
Clarion Corp. vs. American Home Products Corp., 494 Fed.2d 860, 865 (7th Cir.) *cert. denied*, 419 U.S. 870 95 S.Ct. 128, 42 L.Ed. 2d 303 (1974)	9
Dallo vs. INS, 765 Fed.2d 581, 589 (6th Cir. 1985)	6
De Witt vs. Western Pac. R. R. Co., 719 Fed.2d 1448 (9th Cir. 1983)	6
Florence Talamin et al vs. Allstate Insurance Co., 470 U.S. 1067, 85 L.Ed. 125, 105 S.Ct. 1824 (1985)	8
Illinois Brick Co. vs. Illinois, 431 U.S. 720 (1977) *rehearing denied*, 434 U.S. 881 (1977)	6
Molhart vs. Southern Cal. Ret. Clerks Union, 735 Fed.2d 1133 (9th Cir. 1984)	6
Ruderer vs. Fines, 614 Fed.2d 1128 (7th Cir. 1980)	6
Underwood vs. Jefferson Memorial Hospital, 639 Fed. 455 (8th 1980)	7
West Virginia vs. Charles Pfizer and Co., 440 Fed.2d 1079 (2nd Cir. 1971) *cert. denied*, 404 U.S. 871 (1971)	6
WSM, Inc. vs. Tennessee Sales Co., 709 Fed.2d 1084 (6th Cir. 1983)	9

State Cases

Greene vs. Safeco Ins. Co. of America, 140 Cal.App.3d 535, 189 Cal.Rptr. 616 (1983)	4
Moradi-Shalal vs. Fireman's Fund Insurance Companies, 46 Cal.3d 287, 250 Cal.Rptr. 116 (1988)	4

Table of Authorities

State Cases

	Page
Travelers Ins. Co. vs. Lesher, 187 Cal.App.3d 180, 231 Cal.Rptr. 791 (1986) *rev. denied* (1987)	4

Miscellaneous

Canon 7 American Bar Association Model Code of Professional Responsibility 9

Federal Statutes

United States Code, Title 28

Section 1254 (1) 2

Section 1291 3

Section 1332 3

Section 1441 3

State Statutes

California Insurance Code 790.03 ..... 2, 4

Federal Rules

Rule 38 Federal Rules of Appellate Procedure ..... i, 2, 3, 5, 6, 7, 8, 9, 10

No. 89-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

PAUL CAMEN,
Petitioner,

VS.

SAFECO INSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals dated January 20, 1989 and order dated March 14, 1989 denying the petition for rehearing and to reject the suggestion for a rehearing en banc is Appendix A pages A-1 through A-3. The order of the District Court dismissing plaintiff's complaint sua sponte is Appendix B at pages B-1 through B-7.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 14, 1989 and its order denying rehearing was entered on March 14, 1989. This

Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

FEDERAL RULE INVOLVED

Federal Rule 38 of the Federal Rules of Appellate Procedure:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

A. Background

Petitioner, PAUL CAMEN, is an individual who resides in California. Respondent, SAFECO INSURANCE COMPANY, is a Washington corporation which is authorized by the State of California to issue automobile liability insurance policies.

Prior to April 03, 1986 respondent had issued to petitioner an automobile insurance liability policy. The policy provided for "continuous protection".

On or about April 03, 1986 the respondent stated it was not going to renew the policy of insurance.

On February 25, 1987 Petitioner filed suit in the Superior Court of the State of California. The suit alleged respondent violated Section 790.03 of the California Insurance Code when it cancelled the policy. The suit alleged the cancellation occurred because the petitioner had filed several claims with the respondent.

The California Supreme Court had not spoken on the issue of whether an insurer could be sued under Code Section 790.03. While there were California Appellate

decisions on point, petitioner believed a good faith argument could be made that the language used in the policy issued to him was different than the policy language used in the reported California Appellate decisions.

The respondent on April 02, 1987 filed a petition for removal of the action based on diversity of citizenship under 28 U.S.C. Section 1441.

The District Court possessed original jurisdiction under 28 U.S.C. Section 1332. The respondent moved for summary judgment which was to be heard on July 27, 1987. However, on September 03, 1987 the District Court *sua sponte* dismissed the complaint on the grounds respondent insurance company had the right not to renew the policy. The Ninth Circuit Court of Appeals, possessing appellate jurisdiction pursuant to 28 U.S. Section 1291, affirmed the district court judgment in its opinion filed on January 20, 1989. The appellate court also held the appeal was frivolous under Fed. R. App. 38 and granted respondent motion for sanctions in the form of attorney fees and double costs.

The petitioner then filed a petition for rehearing and a suggestion for a rehearing en banc on the sole issue of Fed. R. App. 38 application. The Appellate Court denied the petition on March 14, 1989.

B. The Proceedings in the District Court

The district court on September 03, 1987 dismissed the case *sua sponte.* The court found that there was no statutory duty imposed upon respondent to inform petitioner that the filing of excessive claims will result in non renewal of the policy. The District Court further held the respondent had the right to terminate the policy when the time for renewal occurs.

C. The Decision of the Ninth Circuit

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal by the District Court. The Ninth Circuit cited California Appellate courts which had held an insurer does not have a legal duty to renew an automobile insurance policy citing *Greene vs. Safeco Ins. Co. of America,* 140 Cal.App.3d 535, 189 Cal.Rptr. 616, 618 (1983); *Travelers Ins. Co. vs. Lesher,* 187 Cal.App.3d 180, 231 Cal.Rptr. 791 803 (1986) *rev. denied.* (1987). The Ninth Circuit did not consider petitioner's argument that the language of the policy in the case at bar differed from the policy language in the *Green* and *Travelers* cases. The Ninth Circuit further held it was doubtful whether the California Supreme Court would establish a cause of action for bad faith for failure to renew a policy of insurance based on its recent decision of *Moradi-Shalal vs. Fireman's Fund Insurance Companies,* 46 Cal.3d 287, 250 Cal. Rptr. 116 (1988) which had rejected the right of a private right of action under the Section 790.03 of the California Insurance Code.

The Ninth Circuit then held the appellant had failed to state a cause of action and could not plead any set of facts in support of his claim. The District Court was correct in its dismissal *sua sponte* of the complaint.

The Ninth Circuit then without discussion held the appeal was "frivolous".

The petitioner then filed a petition for rehearing on the sole issue of the application of Rule 38 Fed. R. App. Proc. The petitioner argued the complaint was filed in good faith on the grounds the language in the policy issued to him was different from the policy language issued in the reported appellate decisions. The petitioner further argued that the decision of *Moradi-Shalal* (supra) had no

application to the issue since that decision was (1) rendered after the decision of the District Court and (2) did not apply to first party cases but only third party cases. The Ninth Circuit without comment denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH OTHER COURT OF APPEALS ON WHETHER A SHOWING OF BAD FAITH IS REQUIRED FOR THE IMPOSITION OF SANCTIONS UNDER RULE 38 FEDERAL RULES OF APPELLATE PROCEDURE

The case presents an opportunity, on a limited and essentially undisputed record, for this Court to provide meaningful guidance to the lower courts on the subject of the proper application of Rule 38 sanctions. This case illuminates conflicts among the circuits regarding the application of Rule 38 and primary the issue of whether a showing of "bad faith" is required for sanctions to be imposed.

A. The Decision Below is in Conflict With Other Circuits Which Have Required a Showing of Bad Faith Before Sanctions will be Imposed Under Rule 38 Federal Rules of Appellate Procedure

Rule 38 F.R. App. Proc. allows sanctions to be imposed if the appeal is deemed "frivolous". The Rule does not define the term "frivolous".

The Ninth Circuit does not require a showing of "bad faith" on the part of counsel before it imposes attorney fees under Rule 38. The test adopted by the Ninth Circuit

is, "An appeal is frivolous if the result is obvious or if the claim of error is wholly without merit." See *Molhart vs. Southern Cal. Ret. Clerks Union,* 735 Fed.2d 1133, 1137 (9th Cir. 1984). *De Witt vs. Western Pac. R. R. Co.,* 719, Fed.2d 1448, 1451, (9th Cir. 1983). This test does not require a showing that counsel acted in bad faith and is wholly subjective to the whims of the court. What may be "obvious" one day to justify sanctions may be somewhat cloudy the next day.

The other circuits have taken far different approaches toward the imposition of Rule 38 sanctions. For example the Second Circuit has held, "The imposition of sanctions, however, is highly unusual and requires a clear showing of bad faith on the part of appellants." *West Virginia vs. Charles Pfizer and Co.,* 440 Fed.2d 1079, (2d Cir. 1971) *cert. denied,* 404 U.S. 871 (1971); disapproved on other grounds in *Illinois Brick Co. vs. Illinois,* 431 U.S. 720 (1977) *rehearing denied,* 434 U.S. 881 (1977). The Seventh Circuit has also adopted a requirement of "bad faith" before Rule 38 sanctions are assessed. As the court held in *Ruderer vs. Fines,* 614 Fed.2d 1128, 1132-33 (7th Cir. 1980) "Typically the courts have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for the purpose of delay or harassment or out of sheer obstinancy." (Citations omitted) The Sixth Circuit apparently also requires a showing of bad faith though the Circuit has not expressly stated the requirement. See *Dallo vs. INS,* 765 Fed.2d 581, 589, (6th. Cir. 1985), appeal is frivolous "if it is obviously without merit and is prosecuted for delay, harrassment, or other improper purposes."

Other circuits, while not requiring a showing of actual bad faith before imposing sanctions under Rule 38 do

require a strong showing and impose sanctions only in unusual circumstances. For example, the Eighth Circuit denied sanctions under Rule 38 even though it found the appeal to be meritless since the appellee responded to a typewritten brief with a printed one. The Court stressed that the court should be "cautious" in awarding sanctions. See *Underwood vs. Jefferson Memorial Hospital,* 639 Fed. 455, 458 n.3 (8th Cir. 1980).

II

BECAUSE OF THE SPLIT BETWEEN THE CIRCUITS THIS COURT SHOULD CLARIFY THE APPLICATION OF RULE 38 TO ELIMINATE THE INCONSISTENCY REGARDING THE REQUIREMENTS OF BAD FAITH

As documented above there is a major split between the circuits as to whether "bad faith" is a requirement before sanctions may be imposed under Rule 38.

While this court has held that Rule 38 "affords a Court of Appeals plenary discretion to assess just damages", *Burlington Northern R. Co. vs. Woods,* ____ U.S. ____, 107 S.Ct. 967 (1987), an ad hoc approach on the subject should not exist. As explained supra the imposition of sanctions under Rule 38 can cause a "chilling effect" on the valued right of access to the courts. Without some guidance by this court as to the parameters regarding the proper application of Rule 38 haphazard results will occur obfuscating the purpose behind the enactment of the rule.

Without suggesting Rule 38 should be placed in a straightjacket, deciding whether a showing of bad faith is a requirement is a necessary and proper function of this Court. This case provides a vehicle for the Court to make this determination.

A. A Requirement of Bad Faith Would Serve the Purpose Behind Rule 38 And Yet Still Allow Freedom of Access To The Courts

There is a tension between the imposition of sanctions under Rule 38 and the freedom of access to the courts which such sanctions infringe upon. This court has recognized the problem and has sided with the right to freedom of access. In *Florence Talamin et al vs. Allstate Insurance Company*, 470 U.S. 1067, 85 L.Ed. 125, 105 S.Ct. 1824 (1985) this court was faced with whether to impose sanctions under this court rule 49.2 which allows sanctions to be imposed when an appeal to the court is frivolous. The majority remarks bear repeating:

> "Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principle of open access. . . . But the strong presumption is against the imposition of sanctions for invoking the processes of the law." (Footnotes omitted).

As the Court in *Talamin* (supra) was, however, quick to note there are situations where sanctions are appropriate such as when counsel have pursued the litigation merely to generate fees for themselves, or for purposes of delay.

With the courts struggling to remain afloat in a constantly rising sea of litigation there is little question in the appropriate case sanctions should be imposed.

In *Clarion Corp. vs. American Home Products Corp.,* 494 Fed.2d 860, 865m (7th Cir.) *cert. denied,* 419 U.S. 870, 95 S.Ct. 128, 42 L.Ed. 2d 303 (1974), the court held one of the purposes of Rule 38 is to deter meritless arguments appeals "and thus to preserve the appellate court calendar for cases worthy of consideration." Placing a uniform requirement of a showing of "bad faith" on the part of the appellant would serve the purpose of the rule and yet would still allow the parties full access to the courts. The requirement would penalize the wrongdoer for wasting the court's time and yet not deter counsel from vigorously pursuing the interest of their clients. See Canon 7 ABA Model Code of Professional Responsibility.

Rule 38 Fed. Rules of Appellate Procedure can play an important role in the administration of justice. As the Sixth Circuit has observed a frivolous appeal can "itself be a form of obscenity . . . and should doubtless be more often enforced than ignored in the face of a frivolous appeal." *WSM, Inc. vs. Tennessee Sales Co.,* 709 Fed.2d 1084, 1088 (6th Cir. 1983). The problem with the enforcement of the Rule is the discrepancy between the circuits as to when it should be considered. This case presents an opportunity to resolve the conflicts among the circuits concerning whether the element of bad faith is a proper factor to consider under Rule 38 while still allowing the lower courts the discretion to apply the rule as they deem just.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit on the sole issue of the application of Rule 38 of the Federal Rules of Appellate Procedure.

Respectfully submitted,

Thomas Edward Wall
Counsel for Petitioner,
Paul Camen

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL CAMEN,
Plaintiff,

v.

SAFECO INSURANCE COMPANY OF AMERICA, INC.,
DOES I through X, Inclusive,
Defendants.

Case No. CV 87-2118 JMI (Bx)

ORDER OF DISMISSAL

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, and the file in the case, IT IS HEREBY ORDERED, as follows:

1. The Court, *sua sponte,* dismisses plaintiff's complaint with prejudice. The plaintiff is suing the defendant for violation of the California Insurance Code Section 790.03(h)(1) and for Breach of the Implied Covenant of Good Faith and Fair Dealing. Specifically, the plaintiff alleges that the defendant insurance company acted in bad faith by failing to inform the plaintiff that the filing of excessive claims could result in the cancellation of his policy. The Court finds that there is no statutory duty imposed upon defendant to inform its insured that the filing of excessive claims will result in non-renewal of the policy. Moreover, an insurance company has a right to terminate its policy when the time for renewal occurs. Accordingly, since the plaintiff did not allege any impro-

priety regarding the non-renewal of defendant's policy, the plaintiff's complaint for violation of California Insurance Code Section 790.03(h)(1) and for Breach of the Implied Covenant of Good Faith And Fair Dealing is DISMISSED with prejudice.

2. Furthermore, the defendant's Motion for Summary Judgment and Summary Ajudication of Certain Facts Without Controversy is MOOT.

IT IS SO ORDERED.

DATED: September 3, 1987

JAMES M. IDEMAN

James M. Ideman
United States District Judge

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I, the undersigned state: I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of 18 years and not a party to the within action or proceeding. My business address is 12063 Jefferson Blvd. Culver City, California.

On Oct. 31, 1987, I served the within document:

CIVIL APPEALS DOCKETING STATEMENT

on the person(s) indicated below, by placing one true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Mr. Robert P. Baker
16340 Roscoe Blvd.
Van Nuys, California 91406-1215

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Oct. 31, 1987, at Los Angeles, California.

DENISE CHU

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL CAMEN,
Plaintiff-Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding
No. 87-6428
D.C. No. CV-87-2118-JMI

MEMORANDUM*

Submitted January 13, 1989**
Pasadena, California

BEFORE: ALARCON, BRUNETTI, and THOMPSON,
circuit Judges

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

I.

FACTS AND PROCEEDINGS

Appellant was insured by Safeco, appellee here, under an automobile liability policy. The policy was labeled "Continuous Protection Plan" and contained the language, "This policy will be extended automatically each six months term on payment of the premium when due." The policy also stated:

(c) This agreement shall apply to each successive policy period for which the company consents to renew or continue this policy but nothing herein shall obligate the company to renew or continue this policy beyond the expiration of the policy period.

Appellee's Brief, Appendix A, § 15(c). On April 3, 1986, appellee refused to renew the policy upon tender of the premium. Appellant then brought this action on February 25, 1987, in the Superior Court of California. The defendant removed the action to the U.S. District Court under 28 U.S.C. § 1441 on diversity grounds. Appellant alleged in his complaint a violation of California Insurance Code § 790.03 and breach of the covenant of good faith and fair dealing for refusal to renew the policy and sought general and punitive damages. Appellee moved for summary judgment and although a hearing was scheduled for July 27, 1987, the court declined to hear oral argument. On September 4, 1987, the district court dismissed the complaint for failure to state a claim which effectively mooted appellant's summary judgment motion. Appellant appealed on September 28, 1987.

II.

DISCUSSION

Appellant contends the district court erred when it dismissed the appellant's action sua sponte. We review this question of law de novo. *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987). California law applies to this diversity action. *Erie v. Tompkins R. R.*, 304 U.S. 64, 78 (1936).

Appellant argues that appellee is liable for "bad faith non-renewal" of his automobile insurance policy under Cal. Ins. Code § 790.03(h) and under the covenant of good faith and fair dealing. Both parties recognize that the California Supreme Court has not spoken specifically to the issue of non-renewal of insurance policies. Although it is unclear from the facts, appellant made some excessive claims on his policy. After appellee gave appellant the requisite notice (as required in the policy), it canceled the policy. Appellee had not told appellant that it had this discretion previous to appellant's purchase of the policy. The district court found no statutory duty of an insurer to inform insureds that the filing of excessive claims will result in non-renewal of the policy. And, the district court found that an insurance company has a right to terminate its policy when the time for renewal occurs. [CR 12]

The California Supreme Court has spoken on private rights of action under Cal. Ins. Code § 790.03(h). *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 46 Cal.3d 287, 250 Cal.Rptr. 116 (1988). The court held that the insurance statute was meant to deal with administrative

regulation of insurance practices by the Commissioner of Insurance. *Id.* at 126.

> Neither section 790.03 nor section 790.09 was intended to create a private civil cause of action against an insurer that commits one of the various acts listed in section 790.03, subdivision (h).

Id. The court also made their decision prospective and the decision, which overruled *Royal Globe Ins. Co. v. Superior Court,* 23 Cal.3d 880, 153 Cal.Rptr. 842 (1979), will not apply to those cases seeking relief under section 790.03 filed before the decision here (August 18, 1988). Appellant's complaint here is not barred by the case but is doubtful that this California Supreme Court would find any new private causes of action under 790.03 — that is one for non-renewal of a policy.

Further, the California court would probably be inclined not to create a "bad faith" cause of action for non-renewal of insurance policies. The California appellate courts have spoken on the issue of whether an insurer has a legal duty to renew an automobile insurance policy once a term has expired. *See Greene v. Safeco Ins. Co. of America,* 140 Cal.App.3d 535, 189 Cal.Rptr. 616, 618 (1983); *Travelers Ins. Co. v. Lesher,* 187 Cal.App.3d 180, 231 Cal.Rptr. 791, 803 (1986) *rev. denied,* (1987). In *Greene* the court analyzed a policy provision exactly like the one in the present case:

> This agreement shall apply to each successive policy period which SAFECO consents to renew or continue this policy but nothing herein shall obligate SAFECO to renew or continue this policy beyond the expiration of any policy period.

Id., 189 Cal.Rptr. at 617. In that case, Safeco terminated the insured's coverage because they felt she had been

uncooperative. *Id.* The insured argued there that Safeco's failure to renew her insurance policy was a breach of the implied covenant of good faith and fair dealing. *Id.* The insured argued that the reason for termination was arbitrary and in bad faith. However, Cal. Ins. Code § 667 provides "there shall be no liability on the part of, and no cause of action of any nature shall arise against . . . in any insurer . . . for any statement made . . . in any written notice of cancellation or nonrenewal, or in any other communication, oral or written, specifying the reasons for cancellation or nonrenewal." *Id.*, 189 Cal.Rptr. at 617-18. The court held that Safeco owed no duty to renew the policy and was not liable for damages for breach of the covenant of good faith and fair dealing. *Id.*

> To require liability coverage against the judgment of the contracting parties would constitute an unprecedented judicial interference into private contractual and economic arrangements.

Id., 189 Cal.Rptr. at 619 (citing *Farmers Ins. Exchange v. Cocking*, 29 Cal.3d 383, 390, 173 Cal.Rptr. 846, 850 (1981)). "Unless the policy provides otherwise, an insurer has no legal duty to renew an insurance policy when its term has expired." *Travelers*, 231 Cal.Rptr. at 803. This policy did not "provide otherwise."

Appellant has failed to state a cause of action under California "bad faith" law and under Cal. Ins. Code § 790.03(h). Even if all allegations of material fact are taken as true and construed in the light most favorable to appellant, "it appears beyond doubt that [appellant] can prove no set of facts in support of his claim which would entitle him to relief." *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986). A trial court may dismiss a claim sua sponte under Fed. R. Civ. P. 12 (b)(6) where claimant could not possibly win relief. *Omar* at 991.

Therefore the district court properly dismissed this action here. *Id.*

Appellant's appeal is frivolous, and accordingly appellee's motion for sanctions under Fed. R. App. P. 38 is granted. Appellee shall be granted on application its attorneys fees and double costs.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL CAMEN,
Plaintiff-Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant-Appellee.

No. 87-6428
D.C. No. CV-87-2118-JMI

ORDER*

BEFORE: ALARCON, BRUNETTI, and THOMPSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

AMENDED

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California.

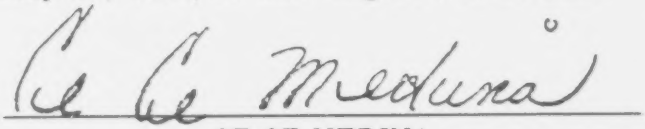
On May 30, 1989, I served the within Petition for writ of certiorari in re: "Paul Camen v. Safeco Insurance Co. of America" in the United States Supreme Court, October Term 1988, on all Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Mr. Robert P. Baker
Attorney at Law
16430 Roscoe Boulevard
Van Nuys, California 91406-1215

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on May 30, 1989, at Los Angeles, California



CE CE MEDINA